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No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

KO SAI-MAN and CHUI KIM-CHUN,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the presumption against retroactive legislation articulated in *Landgraf v. USI Film Products*, 511 U.S. 244, 114 S.Ct. 1483 (1994), bars application of 28 U.S.C. §1355(b), as amended October 1992, which for the first time confers jurisdiction and venue on United States District Courts in *in rem* forfeiture proceedings against overseas assets, to forfeiture actions pending at the time of its enactment.

2. Whether the retroactive application of 28 U.S.C. §1355(b), as amended in October 1992, which for the first time permits the seizure and forfeiture of assets located outside the territorial boundaries of the United States, raises concerns under the *Ex Post Facto* Clause of the United States Constitution and must therefore be applied prospectively to avoid a constitutional question.

PARTIES TO THE PROCEEDING

The parties to the proceedings below were the defendant assets, petitioners/claimants Ko Sai-Man and Chiu Kim-Chun and respondent/plaintiff the United States of America.

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No. _____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1996

KO SAI-MAN and CHUI KIM-CHUN,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

Petitioners Ko Sai-Man and Chiu Kim-Chun ("petitioners") respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in the above-entitled proceedings on September 6, 1996.

I.

OPINIONS BELOW

The published opinion of the Court of Appeals for the Second Circuit is reprinted herein as Appendix A ("App. A"). The amended memorandum decision and judgment of the United States District Court for the Eastern

District of New York (Hurley, D.J.) granting petitioners' motion for judgment on the pleadings has been reported. It is reprinted herein as Appendix B ("App. B"). The judgment of the District Court for the Eastern District of New York dismissing the action for lack of *in rem* jurisdiction is reprinted herein as Appendix C ("App. C").

II.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The judgment and opinion of the United States Court of Appeals for the Second Circuit was entered on September 6, 1996.

III.

CONSTITUTIONAL PROVISION INVOLVED

The *Ex Post Facto* Clause, U.S. Const. Art. I, §9, cl. 3, provides, in part:

> "No Bill of Attainder or ex post facto Law shall be passed."

IV.

STATUTES INVOLVED

Title 28, United States Code, Section 1355(b), as amended effective October 1992, provides, in part:

> (b)(1) A forfeiture action or proceeding may be brought in —
>
> (A) the district court for the

district in which any of the acts or omissions giving rise to the forfeiture occurred . . .

* * *

(2) Whenever property subject to forfeiture under the laws of the United States is located in a foreign country, or has been detained or seized pursuant to legal process or competent authority of a foreign government, an action or proceeding for forfeiture may be brought as provided in paragraph (1), or in the United States District Court for the District of Columbia.

V.

STATEMENT OF THE CASE

In this *in rem* proceeding brought pursuant to 21 U.S.C. §881(a)(6) and 18 U.S.C. §981(a)(1)(A), the United States seeks the forfeiture of approximately $1.5 million[1] in assets belonging to petitioners Ko Sai-Man ("Ko") and his wife, Chiu Kim-Chun (collectively, "petitioners"), comprised of cash, realty, and personalty, all located in Hong Kong. It is alleged that the defendants *in rem*, which were seized in April 1991, constitute proceeds traceable to a conspiracy to import heroin into the United States which operated during the period between January 1986 and September 1988. Petitioners,

[1] The Government estimates the present value of the restrained assets at approximately $3 million.

who are claimants in the underlying forfeiture action, are citizens and residents of Hong Kong. Neither petitioner has been charged with any crime in the United States and Mr. Ko was acquitted of drug trafficking charges in a Hong Kong prosecution instigated by the United States and arising from the same allegations as these forfeiture proceedings.

This petition arises from the Second Circuit's reversal of the order of the District Court for the Eastern District of New York dismissing the forfeiture complaint on the grounds that at the time the action was commenced in September 1991, the District Court lacked *in rem* jurisdiction and venue over assets located outside the territorial boundaries of the United States and that 28 U.S.C. §1355, as amended in October 1992, does not retrospectively vest the District Court with jurisdiction and venue over those assets.

In reversing the trial court, the Second Circuit held that the October 1992 amendments to 28 U.S.C. §1355 ("Section 1355(b)"), which for the first time authorize United States District Courts to adjudicate forfeiture actions against foreign assets previously immune to forfeiture, do not have retroactive effect under the rule articulated in *Landgraf v. USI Film Products*, 511 U.S. 244, 114 S.Ct. 1483 (1994), and are thus applicable to cases pending at the time of their enactment. The Second Circuit, relying primarily on the recent *United States v. Ursery*, ___ U.S. ___, 116 S.Ct. 2135 (1996), also concluded that the presumption in favor of prospective application of new legislation to avoid constitutional issues does not bar retrospective application of the amendments because the forfeiture of the proceeds of drug trafficking and money laundering is strictly remedial and thus cannot offend the *Ex Post Facto* Clause.

In light of the foregoing, this petition raises two significant questions of federal statutory and constitutional law. First, whether the *Ursery* holding that civil forfeiture actions brought under 21 U.S.C. §881(a)(6) and 18 U.S.C. §981(a)(1)(A) are not punitive for purposes of the Double Jeopardy Clause is equally applicable to the *Ex Post Facto* Clause and, second, whether amended Section 1355(b), which for the first time grants the District Court jurisdiction and venue over actions seeking the forfeiture of foreign assets, operates retroactively, *i.e.*, changes the legal consequences of petitioners' past conduct.

The Initiation of Forfeiture Proceedings Against Petitioners' Hong Kong Assets.

In April 1991, the United States seized approximately $1.5 million of petitioners' assets located in Hong Kong. Subsequent to the seizure, the Hong Kong government prosecuted Mr. Ko in Hong Kong, alleging that between January 1986 and September 1988, Mr. Ko participated in a conspiracy to traffick in controlled substances. On September 4, 1991, Mr. Ko was acquitted in Hong Kong of all criminal charges and the restraining order against his assets was discharged.

Immediately following Mr. Ko's Hong Kong acquittal, the defendants *in rem*, were released. At the behest of the United States, however, the High Court of Hong Kong, in a decision rendered January 30, 1992, reinstated the restraining order retroactive to September 4, 1991 pursuant to Hong Kong's 1989 Drug Trafficking (Recovery of Proceeds) Ordinance (Cap 405), as amended by a 1991 Order. Two weeks after the property was raciest, on September 20, 1991, the Government brought the instant action by filing a Verified Complaint

In Rem pursuant to the Supplemental Rules for Certain Admiralty and Maritime Claims. *See* 21 U.S.C. §881(b). The complaint was amended in minor respects on October 16, 1991. The complaint, together with Warrants of Arrest issued under Supplemental Admiralty Rule C(3), were served in Hong Kong.

The Amended Verified Complaint *In Rem* asserts that the defendant assets are subject to forfeiture to the United States as proceeds of narcotics activity and "property traceable thereto in accordance with 21 U.S.C. §881(a)(6) and 18 U.S.C. §981(a)(1)(A)." In substance, the complaint alleges a conspiracy from 1986 to 1988 "to smuggle heroin from Hong Kong into the United States and to launder the proceeds of trafficking in heroin." The complaint elaborates that over the two-year period, approximately ten named individuals assumed various roles in smuggling heroin into the United States on approximately six occasions, and that the heroin was destined for purchase by named co-conspirator, Eng Sui-Hang, a/k/a Johnny Eng, who was subsequently prosecuted in the Eastern District of New York.

Specific allegations concerning Mr. Ko are sparse. Specific allegations tying Mr. Ko and/or the restrained assets to the Eastern District of New York are non-existent. According to the complaint, in November 1986, Mr. Ko "oversaw the conversion from bulk form to a more concealable form" of six kilograms of heroin thereafter smuggled into the United States through Tokyo by two other named individuals and in "April/ May 1988, Johnny Eng purchased . . . in Hong Kong" from three other named individuals 49 kilograms of heroin that Mr. Ko had allegedly delivered to a named middleman, also in Hong Kong.

The complaint further recites that on June 27 and July 4, 1988, Mr. Ko received $168,500 in the form of 200

money orders drawn on 28 United States banks and that in September 1988, petitioners established Eastlex, Ltd. (Eastlex), a real estate investment company. The complaint then proceeds to identify, as defendants *in rem* subject to forfeiture to the United States as proceeds traceable to Mr. Ko's narcotics trafficking here, some twelve parcels of realty purchased by Eastlex or petitioners and various bank accounts, currency, stock, and other personalty owned by them. There is no allegation that any of the defendants *in rem* were removed from the United States, much less the Eastern District of New York.

The Trial Court Proceedings.

In April 1992, petitioners moved for judgment on the pleadings under Fed.R.Civ.P. 12(c) on the ground that at the time the action was commenced, no statute provided the district courts of the United States with *in rem* jurisdiction, venue or the authority to issue process over assets located outside the district, much less outside the territorial boundaries of the United States. The Government vigorously resisted the motion, erroneously urging that jurisdiction obtained at the time of the seizure under federal statutory and case law in effect at the commencement of the action.

In October 1992, while petitioners' motion for judgment on the pleadings was pending, Congress amended Section 1355(b) to fill the gap in existing forfeiture law by providing district courts with venue, *in rem* jurisdiction and service of process over assets located outside the district, including assets outside the territorial boundaries of the United States. Although passage of the amendments confirmed that, at the time the action commenced in September 1991, the District Court for the

Eastern District of New York lacked jurisdiction and venue over the proceedings against the Hong Kong defendants. Undeterred by the inconsistency with its former position, the Government immediately averred that the amendments applied to actions commenced prior to their enactment, retroactively vesting the district court with the requisite jurisdiction and venue.

The Findings of the Trial Court.

In a Report and Recommendation filed on November 12, 1993, Magistrate Judge Allyne Ross found that the District Court lacked *in rem* jurisdiction and venue over the defendant *res* and recommended that petitioners' motion for judgment be granted and the action dismissed. Over the Government's objection, on April 8, 1996, almost five years after the commencement of the action, the District Court adopted the Report and Recommendation and ordered the complaint *in rem* dismissed for lack of *in rem* jurisdiction and venue.

Like Magistrate Judge Ross, the District Court concluded that at the time of the initial seizure in September 1991, no statute conferred the District Court with *in rem* jurisdiction or venue over petitioners' Hong Kong *res*. The trial court also found that express language and legislative history of the amendments lacked a clear indication of Congressional intent that the amendments apply to conduct completed prior to their enactment and thus Section 1355(b) is prospective only. In reaching its decision, the trial court invoked the deep rooted presumption against retroactive legislation, recently emphasized in *Landgraf v. USI Film Products*, 511 U.S. 244, 114 S.Ct. 1483 (1994), and the presumption in favor of prospective application of intervening legislation to

avoid even the "specter" of a constitutional issue, in this case, a violation of the *Ex Post Facto* Clause.

The District Court's amended decision memorandum and order granting petitioners' motion for judgment on the pleadings and ordering the action dismissed was entered on April 25, 1996.

The Decision of the Court of Appeals.

The Government filed a timely notice of appeal. On appeal, the Government abandoned any claim that the District Court had *in rem* jurisdiction or venue over foreign assets at the time of the initial seizure, conceding that at the time this action commenced in September 1991, the United States District Court for the Eastern District of New York lacked jurisdiction, venue and the authority to serve process over the defendant *res* in Hong Kong. Accordingly, the Government's appeal focused solely on whether Section 1355(b) applies to an action commenced prior to its enactment.

On June 24, 1996, the Second Circuit reversed the District Court's Order granting petitioners' motion for judgment on the pleadings. In reversing the trial court's ruling, the Second Circuit concluded that under the rule enunciated in *Landgraf v. USI Film Products*, 511 U.S. 244, 114 S.Ct. 1483 (1994), amended Section 1355(b) which for the first time permitted the United States to confiscate assets located abroad did not have retroactive effect, but was "quintessentially procedural," and that the forfeiture of alleged proceeds of criminal activity is strictly remedial only, and thus the retrospective application of the amendments cannot implicate the *Ex Post Facto* Clause.

VI.

REASONS FOR GRANTING THE WRIT

Prior to its amendment, 28 U.S.C. §1355, simply granted district courts original jurisdiction to hear certain actions, including forfeiture proceedings, arising under any Act of Congress. The amendments, which broadened the jurisdictional basis for forfeiture proceedings, provide, in part:

> (b)(1) A forfeiture action or proceeding may be brought in —
>
> (A) the district court for the district in which any of the acts or omissions giving rise to the forfeiture occurred . . .
>
> * * *
>
> (2) Whenever property subject to forfeiture under the laws of the United States is located in a foreign country, or has been detained or seized pursuant to legal process or competent authority of a foreign government, an action or proceeding for forfeiture may be brought as provided in paragraph (1), or in the United States District Court for the District of Columbia.

It is not contested that amended Section 1355(b) now provides District Courts of the United States with jurisdiction and venue over *in rem* forfeiture actions directed against assets located outside the United States where none previously existed. The only issue remaining is whether the October 1992 amendments can be applied to

cases pending at the time of their enactment, or whether retrospective application is barred by a presumption against retroactive legislation.

The Amendments to 28 U.S.C. Section §1355(b) Which Provide United States District Courts With Jurisdiction and Venue In Forfeiture Actions Directed At Assets Located Abroad Must Be Applied Prospectively Under the Default Rule Articulated in *Landgraf v. USI Film Products*.

In *Landgraf v. USI Film Products*, 511 U.S. 244, 114 S.Ct. 1483 (1994), this Court announced the test for deciding whether a statute applies to cases pending at the time of its enactment. *Landgraf* sets forth a two-step analysis for determining whether to apply an intervening statute to a pending case. First, the court must determine "whether Congress has expressly prescribed the statute's proper reach." 114 S.Ct. at 1505. If so, "there is no need to resort to judicial default rules." *Ibid.* If, on the other hand, the statute lacks clear language requiring retrospective application, the court must determine if the statute "would have retroactive effect, *i.e.*, whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Ibid.* A statute which operates retroactively, may not be applied in proceedings commenced prior to its enactment, absent a clear indication of Congressional intent.

In holding that the test for retroactivity is "whether the new provision attaches new legal consequences" to past events, the Court reinforced the traditional presumption against retroactive legislation, emphasizing that:

> "[T]he presumption against retroactive legislation is deeply rooted in our jurisprudence and embodies a legal doctrine centuries older than our Republic. Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted. For that reason, the 'principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal.' *Kaiser*, 494 U.S. at 855, 110 S.Ct. at 1586 (SCALIA, J., concurring.)."

Landgraf, 114 S.Ct. at 1497.

Whether a statute has retroactive effect is a fact intensive inquiry in which "judges tend to have 'sound . . . instinct[s],' see *Danforth v. Groton Water Co.* 178 Mass. 472, 476, 59 N.E. 1033, 1034 (1901) (Holmes J.), and familiar considerations of fair notice, reasonable reliance, and settled expectations offer sound guidance." *Landgraf*, 114 S.Ct. at 1499.

It is uncontroverted that amended Section 1355(b) lacks clear language requiring retrospective application. The Second Circuit thus applied the default rule enunciated in *Landgraf*, concluding that Section 1355(b), which for the first time permitted the government of the United States to seize and forfeit the overseas assets of foreign citizens, does not attach new legal consequences to prior conduct. The Second Circuit reasoned that the underlying conduct, alleged drug trafficking and money laundering, were illegal at the time the action com-

menced and therefore foreign citizens such as Mr. Ko have always had "fair notice" that their property is subject to confiscation by the United States. Thus, in the opinion of the Second Circuit, petitioners, who are citizens of Hong Kong, should not have been surprised when $1.5 million in property accumulated and located in Hong Kong was suddenly vulnerable to forfeiture by the United States, even though Mr. Ko had been acquitted of all criminal charges in Hong Kong.

The Second Circuit misconstrued *Landgraf* by focusing on the underlying conduct rather than the consequences wrought by the newly enacted provision. The relevant inquiry under *Landgraf* is not whether petitioners had notice that the underlying conduct was illegal, but whether the intervening legislation altered the consequences of that conduct. In *Landgraf* itself, this Court held that Section 102(b)(1) of the Civil Rights Act of 1991, which increased compensatory and for the first time provided punitive damages in civil rights actions, had an impermissible retroactive effect even though the underlying conduct "had been unlawful for more than a generation." *Landgraf*, 114 S.Ct. at 1506, n.35.

Thus, *Landgraf* teaches that an intervening statute operates retroactively where a party previously liable is exposed to a "new disability in respect to past events." *Id.* at 1507, citing *Society for Propagation of the Gospel*, 22 F.Cas. at 767. The court must therefore consider "[t]he *extent* of a party's liability, in the civil context as well as the criminal" which "is an important legal consequence that cannot be ignored." *Landgraf*, 114 S.Ct. at 1507 and n.36. (Emphasis original.)

In this regard, the *Landgraf* Court emphasized that, absent clear language prescribing a statute's reach, it had never read a statute "substantially increasing the

monetary liability of a private party to apply to conduct occurring before the statute's enactment." *Ibid.* In fact, "the largest category of cases in which the Court has applied the presumption against statutory retroactivity has involved new provisions affected contractual or property rights, matters in which predictability and stability are of prime importance." *Id.* at 1500 and n.25.

In *United States v. $814,254.76 in U.S. Currency, Contents of Valley National Bank Account No. 1500-8339*, 51 F.3d 207 (9th Cir. 1995), the Ninth Circuit concluded that, as amended by the Annunzio-Wylie Money Laundering Act of 1992, 18 U.S.C. §984, which for the first time authorized the forfeiture of substitute assets in money laundering cases, "[o]n its face," " 'attaches new legal consequences to events completed before its enactment' " because "the extent of a bank's liability for knowingly permitting its accounts to be used for money laundering has significantly increased." *Id.* at 210. Since the new statute operated retroactively, the *Landgraf* presumption against retroactivity applied, notwithstanding the government's claim that the statute was strictly procedural. *Id.* at 212. Thus, the amendments[2] create a new disability and are thus presumptively prospective.

In rendering its decision, the Ninth Circuit squarely rejected the Government's contention that, as amended, 18 U.S.C. §984 applied to prior conduct, whether or not Congress so intended, because, under *Landgraf*, the amendments were purely procedural. *Id.* at 211-212. Like the Second Circuit in *$814,254.76 in U.S. Currency*, the Government reasoned that 18 U.S.C. §984, which for the first time permitted forfeiture of funds not

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[2] This is the same legislation which included the amendments to 28 U.S.C. §1355 which are at issue here.

previously subject to forfeiture, did not operate retroactively because money laundering was illegal at the time the action commenced. *$814,254.76 in U.S. Currency*, 51 F.3d at 210. Thus, the Government concluded, the new provision did not upset settled expectations regarding rights, liabilities or duties. *Id.*

In flatly rejecting the notion that the statute was strictly procedural because money laundering was illegal at the time the action commenced, the Ninth Circuit noted that,

> [I]n considering whether retrospective application of a statute is 'retroactive' under *Landgraf*, simple categorization is not sufficient. Instead, the "process of judgment" the court must undertake may lead to the conclusion that some "seemingly procedural" changes in the law may impact upon substantial rights in a way that supports the presumption against retroactivity absent clear indications of congressional intent to the contrary.

Id. at 212.

In light of the clear import of *Landgraf* and *$814,254.76 in U.S. Currency*, it cannot be seriously argued that the October 1992 amendments to 28 U.S.C. §1355, which allow the United States to forfeit over $1 million in foreign assets previously immune from forfeiture, does not significantly increase the liability of petitioners (who are foreign nationals, not conversant with the laws of the United States and have never been charged with any crime in the United States) for conduct allegedly completed in 1988, *four years prior to the enactment of the amendments.*

To the contrary, *Landgraf* and *$814,254.76 in U.S. Currency* leave no doubt that by allowing the seizure of foreign assets not previously vulnerable to forfeiture, amended Section 1355(b) operates retroactively by significantly increasing petitioners' liability. Moreover, while petitioners may have been on notice that drug trafficking an money laundering activities are subject to criminal prosecution both in Hong Kong and the United States, petitioners were not on notice that virtually all of their Hong Kong assets were in jeopardy of forfeiture by the United States Government even though Mr. Ko was acquitted of all criminal charges. Nor could petitioners reasonably be expected to conceive that under the arcane admiralty laws which govern forfeiture, a New York court could effectively order the seizure and forfeiture of all his assets for conduct found innocent by a Hong Kong court and which, assuming *arguendo* did occur, by the Government's own allegations, occurred entirely in Asia.

The increased disability, lack of notice and unfair surprise threatened by legislation which would allow the Government to strip foreign citizens of assets previously beyond the reach of the forfeiture laws of the United States, dictate that Section 1355(b) be applied prospectively.

Nevertheless, as a fallback, the Second Circuit noted that, in any event, amended Section 1355(b) is a jurisdictional statute, which is "quintessentially procedural," and is thus exempt from the presumption against retroactive legislation. In this regard, the Second Circuit relies on *dicta* in which the *Landgraf* Court observed that rules which "confer or oust" jurisdiction are routinely applied retrospectively because,

> [a]pplication of a new jurisdictional rule *usually* "takes away no substan-

> tive right but simply changes the tribunal that is to hear the case." *Hallowell*, 239 U.S., at 508, 36 S.Ct. at 202. Present law normally governs in such situations because jurisdictional statutes "speak to the power of the court rather than to the rights and obligations of the parties," *Republic Nat. Bank of Miami*, 506 U.S. 55, 71, 113 S.Ct. at 565 (THOMAS, J. concurring).

Landgraf, 114 S.Ct. at 1502. (Emphasis added.) Similarly, "changes in procedural rules may often be applied in suits arising before their enactment without raising concerns about retroactivity," because "rules of procedure regulate secondary rather than primary conduct" and thus the application of a new procedural does not have retroactive effect. *Ibid.*; cf. *McBurney v. Carson*, 99 U.S. 567, 569, 25 L.Ed. 378 (1879).

Consistent with these general rules, the Second Circuit concluded that the amendments do not raise any concerns about retroactivity because they reach only secondary conduct, to specifically, "the court's — its jurisdiction — over the res located overseas," not any primary or substantive right of petitioners. The Second Circuit's finding is directly contrary to the Ninth Circuit's holding in *United States v. $814,254.76 in U.S. Currency, Contents of Valley National Bank Account No. 1500-8339*, 51 F.3d 207 (9th Cir. 1995) that legislation expanding forfeiture law to reach assets previously immune to forfeiture attaches new legal consequences to past conduct and is thus prospective only. *See supra.*

Moreover, the Second Circuit's ruling essentially imposes a blanket rule that statutes which affect jurisdiction cannot have retroactive effect and may thus always

be applied to pending cases. *Landgraf*, however, does not stand for such a sweeping proposition. Indeed, the *Landgraf* Court explicitly rejected such an expansive rule, cautioning that "Nor do we suggest that concerns about retroactivity have no application to procedural rules." *Landgraf*, 114 S.Ct. at 1502-03, n.29. The Ninth Circuit has explained that *Landgraf* imposes a rebuttable presumption in favor of retroactivity for purely jurisdictional statutes. The presumption may be rebutted by "some indication that the jurisdictional rule curtail[s] a substantive right by 'impair[ing] rights a party possessed when he acted, increas[ing] a party's liability for past conduct, or impos[ing] new duties with respect to transactions already completed.' " *United States ex. rel. Schumer v. Hughes Aircraft*, 63 F.3d 1512, 1517 (9th Cir. 1995), citing *Landgraf*, 114 S.Ct. at 1502, 1505, *petition for cert. filed*, 64 U.S.L.W. 3593 (February 15, 1996) (No. 95-1340).

In other words, whether the statute is procedural or jurisdictional is not the dispositive issue. Even "procedural" and "jurisdictional" statutes are impermissibly retroactive if they affect the legal consequences of past conduct. Thus, the relevant inquiry is whether new legislation would impair substantive rights, alter the legal consequences of the defendant's conduct or increase the liability for past conduct — not whether the legislation can be labelled "jurisdictional" or "procedural."

Further, *Landgraf* explicitly instructs that there is no blanket rule that even "remedial" statutes, like procedural statutes, should be presumptively applied to pending cases. Rather, while that rule holds true for some remedies, "we have not classified a statute introducing damages liability as the sort of 'remedial' change that should presumptively apply in pending cases."

Landgraf, 114 S.Ct. at 1507 n.37. Thus, even if civil forfeiture of the proceeds of narcotics trafficking is strictly remedial, *see, infra*, statutes which extend forfeiture to assets previously outside the purview of those proceedings, are presumptively prospective.

In sum, whether labelled "procedural" or "jurisdictional," legislation which permits the Government of the United States to reach beyond its borders, to seize the assets of foreign citizens, significantly increases the disability on petitioners for past conduct, which, if it occurred, was completed over four years prior to the amendments. Fundamental notions of fairness which demand that individuals be afforded notice of the consequences of their conduct, also require that the presumption against retroactive legislation be applied to bar of application of amended Section 1355(b) to this action.

Amended Section 1355(b) Which Expands Jurisdiction To Foreign Assets Not Previously Vulnerable to Forfeiture Raises *Ex Post Facto* Concerns Which Trigger a Presumption in Favor of Prospective Application.

Having determined that amended Section 1355(b) does not operate retroactively, the Second Circuit next considered whether there is a constitutional infirmity which bars application of amended Section 1355(b) to a case pending at the time of its enactment; specifically, whether retroactive application of Section 1355(b) raises *ex post facto* concerns.

The *Ex Post Facto* Clause, U.S. Const. Art. I, §9, cl. 3, prohibits retroactive application of penal legislation. The *Ex Post Facto* Clause not only ensures that individuals have " 'fair warning' about the effect of criminal

statutes, but also 'restricted governmental power by restraining arbitrary and potentially vindictive legislation.' " *Landgraf*, 114 S.Ct. at 1497-98, quoting *Weaver v. Graham*, 450 U.S. 24, 101 S.Ct 960, 67 L.Ed. 17 (1981).

"[T]o fall within the *ex post facto* prohibition, two critical elements must be present: first, the law 'must be retrospective, that is, it must apply to events occurring before its enactment'; and second, 'it must disadvantage the offender affected by it.' " *Miller v. Florida*, 482 U.S. 427, 431 (1987), quoting *Weaver v. Graham*, 450 U.S. 24, 29 (1981). A law is retrospective and thus potentially violative of the *ex post facto* prohibition "if it 'changes the legal consequences of acts completed before its effective date.' " *Miller*, 492 U.S. at 431, quoting *Weaver*, 450 U.S. at 31. "Although the prohibition generally applies to criminal statutes, it may also be applied in civil cases where the civil disabilities disguise criminal penalties." *Louis Vuitton S.A.*, 765 F.2d at 972 (citing *Harisiades v. Shaughnessy*, 342 U.S. 580, 595 (1952); *DeVeau v. Braisted*, 363 U.S. 144, 160 (1960) (plurality opinion of Frankfurter, J.)). "The mark of an *ex post facto* law is the imposition of what can fairly be designated punishment for past acts." *DeVeau*, 363 U.S. 160.

The *ex post facto* bar was incorporated into the Constitution in two places, prohibiting such retroactive legislation by both Congress and state legislatures. Article I of the Constitution provides, at §9, Clause 3, that "[n]o Bill of Attainder or *ex post facto* Law shall be passed." It also provides, at §10, Clause 1, that "[n]o State shall . . . pass any Bill of Attainder, *ex post facto* Law, or law impairing the Obligation of Contracts. . . ." The Constitution makes no civil or criminal distinction for determining the applicability of the *Ex Post Facto*

Clause. Further, an analysis of the historical background of the *Ex Post Facto* Clause suggests that the framers intended the clauses reach all retrospective laws, regardless of whether they were deemed purely criminal in nature. *See* Jane H. Aiken, *Ex Post Facto in the Civil Context*, 81 Ky. L.J. 929-32 (1993).

The 'cardinal principle' that a court adopt a construction that avoids constitutional questions compels a prospective construction of 28 U.S.C. §1355 because retroactive application of the statute would raise grave constitutional questions. As explained in *Louis Vuitton S.A. v. Spencer Handbags Corp.*:

> Where a statute may be construed to have either retrospective or prospective effect, a court will choose to apply the statute prospectively if constitutional problems can thereby be avoided. Resolution of the constitutional issue need not be certain; there need only be a "substantial doubt," or an indication that the constitutional question is "non-frivolous." "Even the specter of a constitutional issue" is sufficient to construe the statute to provide for only prospective relief.

Louis Vuitton S.A. v. Spencer Handbags Corp., 765 F.2d 966, 971 (2d Cir. 1985) cited with approval in *Landgraf*, 114 S.Ct. at 1505-06.

Applying this rule, the *Vuitton* court held that the treble damages provision of the Trademark Counterfeiting Act of 1984, a civil statute, raised constitutional questions concerning, in part, the *Ex Post Facto* Clause, mandating a prospective construction of the statute to render constitutional analysis unnecessary.

> "we do not, and need not, decide the constitutional questions; we need only determine that the *ex post facto* . . . question[] [is] sufficiently serious to persuade us to choose the construction that avoids the constitutional issue[]."

Vuitton, 765 F.2d at 971.

In analyzing the legislative history of the amendment awarding treble damages in trademark counterfeiting cases, the *Vuitton* court concluded that Congress intended, at least in part, "to penalize counterfeiters as a means of deterrence." *Vuitton*, 765 F.2d at 972. Cautioning that "[w]e do not decide that retroactive application of this statute would violate the *ex post facto* prohibition, only that it would raise the issue," the court concluded that "exclusively prospective application [is] the better course." *Id.*

Landgraf confirms that to implicate the *Ex Post Facto* Clause, legislation need not be penal, but must simply "share key characteristics" of criminal sanctions. Thus, in its discussion of punitive damages, *Landgraf* instructs that:

> "the very labels giving 'punitive' or 'exemplary' damages, as well as the rationales that support them, demonstrate that they share key characteristics of criminal sanctions. Retroactive imposition of punitive damages would raise a serious constitutional question. *See Turner Elkhorn*, 428 U.S. at 17, 96 S.Ct. at 2893 (Court would 'hesitate to approve the retrospective imposition of liability on any theory of deterrence . . . or blameworthi-

> ness'); *De Veau v. Braisted*, 363 U.S. 144, 160, 80 S.Ct 1146, 1155, 4 L.Ed.2d 1109 (1960)('The mark of an ex post facto law is the imposition of what can fairly be designated punishment for past acts'). *See also Louis Vuitton S.A. v. Spencer Handbags Corp.*, 765 F.2d 966, 972 (CA2 1985) (retroactive application of punitive treble damages provisions of Trademark Counterfeiting Act of 1984 'would present a potential *ex post facto* problem.')"

Landgraf, 1505-06.

In *Austin v. United States*, 509 U.S. 602, 113 S.Ct. 2801 (1993), this Court held that, in certain circumstances, civil forfeiture is not remedial, but constitutes punishment. In *Austin*, the Court held that the Excessive Fines Clause of the Eighth Amendment applies to civil forfeiture proceedings. After defining the determinative "question as not, as the United States would have it, whether forfeiture . . . is civil or criminal, but rather whether it is punishment," *id.* at 2806, the Court proceeded to review English and American law of forfeiture at the time the Eighth Amendment was ratified, concluding that "forfeiture generally and statutory *in rem* forfeiture in particular historically have been understood, at least in part, as punishment." 113 S.Ct. at 2810.

The Court also concluded that forfeitures under 21 U.S.C. §881(a) are properly considered punishment today, citing the statute's focus on the owner's culpability by "expressly provid[ing] an 'innocent owner' defense," *ibid.*, and the Congressional choice "to tie forfeiture directly to the commission of drug offenses."

Id. at 2811. Finally, the Court found that "[t]he legislative history of §881 confirms the punitive nature of these provisions," writing:

> When it added subsection (a) (7) to §881 in 1984, Congress recognized "that the traditional criminal sanctions of fine and imprisonment are inadequate to deter or punish the enormously profitable trade in dangerous drugs." S.Rep. No. 98-225, p. 191 (1983). It characterized the forfeiture of real property as "a powerful deterrent." *Id.* at 195. See also Joint House-Senate Explanation of Senate Amendment to Titles II and III of the Psychotropic Substances Act of 1978, 124 Cong. Rec. 34671 (1978) (noting "the penal nature of forfeiture statutes").

Id. at 2811 (footnote omitted).

Based primarily on the *Ex Post Facto* Clause's language and the *Austin* holding, the trial court concluded that the retrospective application of the amended Section 1355(b) to this Court would raise grave doubts concerning the constitutionality of retroactively applying 28 U.S.C. §1355(b) — rendering subject to *in rem* forfeiture assets previously free from monetary punishment — to cases pending at the time of its enactment. Accordingly, under the "cardinal principle" of statutory construction applied in *Vuitton*, mandating an interpretation that avoids constitutional issues without deciding them, it was incumbent upon the court to deny Section 1355(b) retrospective application.

On June 24, 1996, however, this Court handed down its opinion in *United States v. Ursery*, ___ U.S. ___, 116 S.Ct. 2135 (1996), holding that civil forfeiture actions directed to the proceeds of drug trafficking or money laundering pursuant to 21 U.S.C. §881 (a)(6) and 18 U.S.C. §981 (a)(1)(A), which control this action, are not punitive for purposes of the Double Jeopardy Clause. In reaching this decision, the Court limited the *Austin* holding to the Excessive Fines Clause of the Eighth Amendment and to forfeiture actions brought pursuant to 21 U.S.C. §881 (a)(4) and (a)(7), which govern the forfeiture of the instrumentalities of crime, not the proceeds of illegal activity. 116 S.Ct. at 2146, 2148.

Based on *Ursery*'s reasoning, the Second Circuit rejected the District Court's reliance on *Austin*, concluding that forfeitures directed at the proceeds of crime are not penal and thus there can be no "substantial doubt" that the retroactive application of Section 1355(b) would survive a challenge under the *Ex Post Facto* Clause.

The Second Circuit's reliance on *Ursery* was misplaced. *Ursery* holds that civil forfeiture actions directed at the proceeds of illegal activity are not punitive for purposes of the Double Jeopardy Clause. Neither *Ursery*, nor any other decision of this Court, reaches the issue of whether the civil forfeiture of proceeds implicates the *Ex Post Facto* Clause. Indeed, to raise *ex post facto* concerns, intervening legislation need not be penal or punitive, but need only share the characteristics of a penal sanction, namely, the "imposition of liability on any theory of 'deterrence . . . or blameworthiness.' " *See Landgraf*, 114 S.Ct. at 1505, quoting *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15-16, 96 S.Ct. 2882, 2892-93 (1976). This is in marked contrast to a double jeopardy analysis which requires a definitive showing that a second remedy is, in fact, punitive.

Although forfeitures may be "civil" in nature, there is no doubt that they share certain punitive aspects. *Austin* teaches that throughout history forfeitures have been intended to punish blameworthy owners. *Austin*, 509 U.S. at 629. Nothing in the *Ursery* holding abrogates this well-entrenched notion that civil forfeitures are intended, in some measure, to deter future crimes by providing for the seizure and confiscation of their proceeds from those deemed culpable. *See, e.g., Ursery*, 116 S.Ct. at 2135 (Kennedy, J., concurring) (does not question the punitive nature of § 881(a)(7); forfeiture "punishes an owner by taking property involved in a crime.").

This is all that is required to raise the specter of an *Ex Post Facto* Clause violation. Even the "specter" that the *Ex Post Facto* Clause might be implicated by the retroactive application of the October 1992 amendments is sufficient to trigger the presumption in favor of construing the amended Section 1355(b) prospectively in order to avoid a constitutional issue.

CONCLUSION

In conclusion, the October 1992 amendments to 28 U.S.C. §1355(b), which would strip petitioners of $1.5 million in real and personal property not previously subject to forfeiture under the laws of the United States, are, on their face, retrospective; significantly increasing petitioners' liability for conduct completed prior to their enactment. Accordingly, in the absence of clear Congressional intent to the contrary, the amendments must be presumed prospective. Moreover, 28 U.S.C. §1355(b), which expands the jurisdictional reach of federal civil forfeiture statutes to encompass assets located in foreign countries, applies prospectively

because a contrary construction would raise the constitutional issue of whether retrospective application would violate the *Ex Post Facto* Clause.

For all the foregoing reasons, the petition for writ of certiorari should be granted.

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Respectfully submitted,

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